Chai Kiaw @ Chai Shak Kiaw (f) v Plus Forever Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO 22–111 OF 2007–III
RAVINTHRAN PARAMAGURU JC
6 AUGUST 2009

Contract — Breach — Termination — Claim for refund of monies paid under contract — Property sale and purchase agreement — Agreement allowed vendor to treat all payments as agreed pre-estimated damages — Whether 46% of purchase price paid by purchaser forfeitable — Whether vendor could forfeit payments without proof of actual loss or damage — Effect of s 75 of the Contracts Act 1950

Contract — Building contract — Delay — Two different agreements executed providing for two different construction periods — Second agreement a mere formality — Construction period in first agreement to be applicable — Whether defendant failed to complete construction within agreed period — Time of essence — Whether long delay amounted to fundamental breach entitling purchaser to rescind

Contract — Deposit — Forfeiture — Refund of deposit — Property sale and purchase agreement — Agreement allowed vendor to treat all payments as agreed pre-estimated damages — Whether 46% of purchase price paid by purchaser forfeitable — Whether vendor could forfeit payments without proof of actual loss or damage — Effect of s 75 of the Contracts Act 1950

The plaintiff being the owner of a piece of land entered into a sale and purchase agreement ('the first agreement') to sell the said land to the defendant, a developer. The sale price was RM1,575,000. Clause 2 of the agreement provided that the payment of the sale price was to be effected as follows: (i) a sum of RM100,000 as deposit upon the signing of the agreement; (ii) a sum of RM680,000 in kind in that the plaintiff and the defendant were to simultaneously enter into a standard sale and purchase agreement for the purchase/sale of one unit apartment ('the second agreement') wherein the defendant had to construct and complete the plaintiff's apartment within 12 months from the date of the agreement; and (iii) the balance sums to be paid by the defendant at agreed dates. The apartment was not completed within the 12 months period. However, the second agreement stipulated the completion time as 36 months. The

defendant had made several payments to the plaintiff by then. The plaintiff's solicitors wrote to the defendant terminating the first agreement, inter alia, on the ground of: (i) failure to deliver the apartment within 12 months; and (ii) failure to pay to the plaintiff the sum of RM110,000 being part of the purchase price of the land. The issues which arose for the court's determination was (i) whether the plaintiff was entitled to terminate the agreement and; (ii) whether she was allowed to forfeit any of the payments already made to her.

Held, allowing the plaintiff's application in part with costs:

(1) The first agreement provided that the apartment was to be constructed within 12 months. It was clear from the evidence and cl 2 of the first agreement that the second agreement was a mere formality. Therefore the parties could not have intended the completion period to be 36 months (see paras 7–8).

(2) The cause of action was not based on the second agreement but on the first agreement that provided only 12 months for the payment of RM680,000 in the form of delivery of the completed apartment. Clause 10(a) of the first agreement provided that the time shall be the essence. The long delay amounted to a fundamental breach of the agreement which entitled the plaintiff to rescind the agreement (see para 8).

(3) In Malaysian law, there is no distinction between liquidated damages and penalties in view of s 75 of the Contracts Act 1950 ('Act'). Clause 13 allowed the vendor to treat all payments as 'agreed pre-estimated damages'. The use of such a term instead of 'penalty' will make no difference if the sum so named is not reasonable (see para 14).

(4) The plaintiff's right to forfeit any sums already paid was governed by s 75 of the Act. The plaintiff did not prove damages arising from loss of use of the land. She only relied on the agreement to forfeit the part payments of RM415,000 paid to her. Apart from this sum which had been paid to her, she caused the defendant to enter into another contra deal with her sons for the purchase of another apartment. Therefore the total sum that had been paid for the benefit of the plaintiff because of the agreement was RM725,000 which was 46% of the purchase price of the land. In the absence of proof of loss, this was not reasonable compensation under s 75. The initial payment at the signing of the agreement was RM100,000 and it was referred to as a 'deposit'. This figure was more reasonable. Therefore the plaintiff could only forfeit the deposit of RM100,000 paid under the first agreement. Part payments

amounting to RM665,000 that were received for the benefit of the plaintiff had to be returned to the defendant (see paras 14–15 & 17(c)).

[Bahasa Malaysia summary

Plaintif yang merupakan pemilik sebidang tanah menandatangani satu perjanjian jual beli ('perjanjian pertama') untuk menjual tanah tersebut kepada defendan, seorang pemaju. Harga jualan adalah RM1,575,000. Klausa 2 perjanjian itu menyatakan bahawa pembayaran harga jualan adalah seperti berikut: (i) sejumlah RM100,000 sebagai deposit apabila menandatangani perjanjian itu; (ii) sejumlah RM680,000 dibayar dalam mana plaintif dan defendan dengan serentak menandatangani satu perjanjian jual beli yang standard untuk pembelian/jualan seunit pangsapuri (perjanjian kedua) di mana defendan perlu membina dan menyiapkan pangsapuri plaintif dalam tempoh 12 bulan dari tarikh perjanjian tersebut; dan (iii) jumlah baki dibayar oleh defendan pada tarikh-tarikh yang dipersetujui. Pangsapuri tersebut tidak siap dibina dalam tempoh 12 bulan tersebut. Walaubagaimanapun, perjanjian kedua menyatakan tempoh masa penyempurnaan adalah 36 bulan. Defendan telah membuat beberapa pembayaran kepada plaintif ketika itu. Peguam cara plaintif menulis kepada defendan untuk menamatkan perjanjian pertama, antara lain, atas alasan: (i) kegagalan untuk menyerahkan pangsapuri tersebut dalam tempoh 12 bulan; dan (ii) kegagalan membayar plaintif wang sejumlah RM110,000 yang menjadi sebahagian daripada harga belian tanah tersebut. Isu-isu yang timbul untuk diputuskan oleh mahkamah adalah (i) sama ada plaintif berhak menamatkan perjanjian tersebut; dan (ii) sama ada dia dibenarkan untuk merampas mana-mana bayaran yang telah dibuat kepadanya.

Diputuskan, membenarkan sebahagian permohonan plaintif dengan kos:

(1) Perjanjian pertama memperuntukkan bahawa pangsapuri tersebut harus siap dibina dalam tempoh 12 bulan. Adalah jelas daripada keterangan dan klausa 2 perjanjian pertama bahawa perjanjian kedua adalah hanya satu formaliti. Oleh itu pihak-pihak tidak mungkin mengkehendaki tempoh penyempurnaan menjadi 36 bulan (lihat perenggan 7–8).

(2) Kausa tindakan tidak berasaskan pada perjanjian kedua tetapi pada perjanjian pertama yang memperuntukan hanya 12 bulan untuk pembayaran RM680,000 dalam bentuk serahan sempurna pangsapuri. Klausa 10(a) perjanjian pertama menyatakan bahawa masa adalah intipati. Kelewatan yang terlalu lama menjadi satu kemungkiran asasi perjanjian tersebut yang memberi hak kepada plaintif untuk membatalkan perjanjian tersebut (lihat perenggan 8).

(3) Dalam undang-undang Malaysia, tiada perbezaan antara ganti rugi jumlah tertentu dan penalti berikutan dengan s 75 Akta Kontrak 1950 ('Akta). Klausa 13 membenarkan penjual menganggap semua bayaran sebagai 'agreed pre-estimated damages'. Penggunaan istilah sedemikian daripada istilah 'penalti' tidak akan mendatangkan apa-apa perubahan jika jumlah yang dinyatakan tidak berpatutan (lihat perenggan 14).

(4) Hak plaintif untuk merampas apa-apa jumlah yang telah dibayar dikawal oleh s 75 Akta. Plaintif tidak membuktikan bahawa kerugian-kerugian berpunca daripada kehilangan penggunaan tanah tersebut. Dia hanya bergantung pada perjanjian untuk menuntut bayaran RM415,000 yang dibayar kepadanya. Selain jumlah ini yang telah dibayar kepadanya, dia menyebabkan defendan menandatangani perjanjian urusan kontra dengan anak-anak lelakinya untuk pembelian satu lagi pangsapuri. Oleh itu jumlah keseluruhan yang telah dibayar bagi manfaat plaintif disebabkan oleh perjanjian tersebut adalah RM725,000 yang merupakan 46% daripada harga belian tanah tersebut. Dalam ketiadaan bukti kerugian, ini bukan pampasan munasabah di bawah s 75. Pembayaran permulaan semasa menandatangani perjanjian tersebut adalah RM100,000 dan ia telah dirujuk untuk sebagai 'deposit'. Jumlah ini adalah lebih munasabah. Oleh itu plaintif hanya boleh menuntut deposit RM100,000 yang telah dibayar di bawah perjanjian pertama. Bayaran-bayaran sebahagian yang berjumlah RM665,000 yang telah diterima untuk manfaat plaintif perlu dikembalikan kepada defendan (lihat perenggan 14–15 & 17(c)).]

Notes

For a case on termination, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2719.

For cases on delay, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2830–2844.

For cases on forfeiture, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3437–3449.

Cases referred to

Invescor Sdn Bhd v Sobena Maju Sdn Bhd [2008] 2 MLJ 363, CA (refd)

Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 3 MLJ 348; [2009] 4 CLJ 569, CA (folld)

Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang [2000] 7 MLJ 74, HC (refd)

Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, PC (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Legislation referred to
Contracts Act 1950 s 75

Alvin Yong (Yung Ing Ing with him) (Chong Brothers Advocates) for the plaintiff. Freddy James Gudum (Chai & Co Advocates) for the defendant.

Ravinthran Paramaguru JC:

INTRODUCTION

[1] The plaintiff is the owner of a piece of land known as Lot 1288, Block 7, Matang Land District. She entered into a written agreement to sell the said land to the defendant who is developer. In accordance with the sale agreement, she executed a power of attorney in favour of the defendant for the purpose of developing the land. At the same time, the defendant entered a caveat over the property to protect their interest. The plaintiff now claims that the defendant breached the agreement and therefore she wants to forfeit all the monies paid to her. She is asking for a declaration to that effect. She also is asking for the caveat to be removed and the power of attorney to be revoked.

BACKGROUND FACTS

[2] The basic facts of this case are largely undisputed. The parties agreed that they had entered into a sale and purchase agreement ('the first agreement') in respect of the said land on 18 July 2005. The sale price of the land was RM1,575,000. Clause 2 of the agreement provided that the payment of the purchase sum shall be effected as follows:

(i) a sum of RM100,000.00 as deposit upon the signing of the agreement;

(ii) a sum of RM680,000.00 in kind in that the Plaintiff and the Defendant shall simultaneously enter into an Agreement for the purchase/sale of one unit apartment distinguished as Parcel No. E 1/2-3 of parent Lots 1918 and 1920 both of Block 16 Kuching Central Land District provided that the Defendant shall construct and complete the Plaintiff's apartment *within twelve (12) months from the date of the said Agreement* and provided further that the Plaintiff shall at its own cost within one (1) month from the date of the Agreement obtain a letter of undertaking from Public Bank Berhad to exclude the Plaintiff's apartment from foreclosure proceedings and in the event of the Defendant failing to obtain a letter of undertaking from Public Bank Berhad to exclude the Plaintiff's apartment from foreclosure proceedings, the sum of RM680,000.00 shall be forthwith due and payable;

(iii) a sum of RM295,000.00 shall be paid by the Defendant to the Plaintiff within one (1) month from the date of the said Agreement;

(iv) a sum of RM250,000.00 shall be payable by the Defendant to the Plaintiff within six (6) months from the date of the said Agreement;

(v) a balance sum of RM250,000.00 shall be paid by the Defendant to M/s Lai & Co. Advocates as stakeholder for the Plaintiff within twelve (12) months from the date of the said Agreement whereupon the Plaintiff shall transfer or cause to be transferred the Land to the Defendant.

[3] The sale and purchase agreement also contained the following clauses on which the plaintiff has based her cause of action:

(a) Clause 10(a) of the said agreement provided that time wherever mentioned shall be of the essence;

(b) Clause 13 of the said agreement provided that in the event that the defendant being in breach of any of the terms and conditions contained in the said agreement, failing to tender the purchase price of the land in accordance with cl 2 of the agreement, then all sums of money paid to the vendor shall be forfeited as agreed pre-estimated liquidated damages whereupon the plaintiff and the defendant shall treat the said agreement as having been revoked and rescinded and there shall be no claims against each other.

(c) Clause 14 provided that the plaintiff and the defendant agree that vacant possession of the land shall be delivered by the plaintiff to the defendant upon full payment of the purchase price.

[4] The plaintiff and defendant did not dispute the execution of the above mentioned sale and purchase agreement. They also did not dispute the terms of the agreement. Upon signing the agreement, the plaintiff received the deposit referred to in cl 2(a) of the agreement. The plaintiff also admitted receiving RM150,000 on or about 19 September 2005 and RM145,000 on or about the 12 October 2005. The defendant did not deny making these payments either. In respect of the payment of RM680,000 in kind, cl 2(iii) provided for the sale of an apartment which was to be constructed by the defendant within 12 months on another piece of land. For this purpose, the parties entered into another sale and purchase agreement ('the second agreement') in respect of this apartment. There is no dispute that this agreement was signed. There is also no dispute the construction of the apartment in question was not completed within the 12 months period. In fact the defendant did not deny that it was not completed up to present time. However, in the second sale and purchase agreement in respect of the apartment which is a standard form agreement, the completion time is stipulated as 36 months. The plaintiff said in her witness statement that

sometime towards the end of 2005, a further payment of RM390,000 from the defendant was sought through a contra deal. The two sons of the plaintiff bought an apartment from the defendant. They obtained a loan from RHB bank in the sum of RM330,000. The bank released the money to the defendant. In view of the contra deal, the defendant was supposed to return this money to the plaintiff's sons. The defendant however re-released only RM310,000 to the sons of the plaintiff. The purchase price of the apartment in the sale and purchase agreement is stated as RM450,000.

[5] On 16 March 2007, the plaintiff's solicitors wrote to the defendant terminating the first sale and purchase agreement on the ground of:

(a) failure to deliver Parcel No E 1/2-3 of parent Lots 1918 and 1920 both of Block 16 Kuching Central Land District within 12 months from the date of the said agreement;

(b) failure to pay to the plaintiff the sum of RM110,000 being part of the purchase price of the land; and

(c) failure to pay to the plaintiff's son the sum of RM20,000.

ISSUES

[6] Having regard to the pleadings, the two principal issues for the determination of the court are:

(a) whether the plaintiff is entitled to terminate the agreement; and

(b) whether she is allowed to forfeit any of the payments already made to her.

TERMINATION

[7] It must be noted that a big portion of the purchase price was to be paid in kind in the form of an apartment that was to be constructed on the defendant's land. Clause 2(i) provided that this apartment must be constructed within 12 months from the date of the signing of the agreement which was on 18 July 2005. At the date of the termination letter issued by the solicitors of the plaintiff, 20 months had elapsed. The plaintiff testified that the apartment was not completed by that time. In fact it had not been completed until present time. The defendant's witness did not deny the evidence of the plaintiff or the pleaded case of the plaintiff on this point. However, the defendant's counsel submitted that the second agreement which the parties had signed, ie the sale and purchase agreement of the apartment stated that the developer has 36 months to complete the construction. Counsel for plaintiff argued that the intention of the parties was to fix the time frame for the completion of the agreement at 12 months as provided in

the first agreement. He said that the first agreement provided for the execution of second agreement as a matter of formality. That was why it was executed simultaneously with the first agreement. I am of the opinion that there is merit in this argument. From a reading of the first agreement, it is clear that the parties had provided that the purchase of the apartment by the plaintiff from the defendant was a payment in kind. Clause 2 provided a time frame for all part payments. In respect of the apartment, it ('the first agreement') provided that it was to be constructed within 12 months. It was also clear from the evidence of the plaintiff and cl 2 of the first agreement that the second agreement that was signed for the purchase of the apartment was a mere formality. This is the reason why the schedule of progress payments that is found in this standard sale and purchase agreement was not complied with as it was to be given to the plaintiff as payment in kind. During cross-examination, the defendant's managing director and sole witness conceded that second agreement was a mere formality and the schedule of payments need not be complied with. She said as follows:

Q: Simultaneous agreement was entered as a matter of formality to show that the Plaintiff had purchased this unit from the Defendant, agree?

A: Yes.

Q: This agreement can be found at pages 12 to 38 of Bundle A. Do you agree?

A: Yes.

Q: Refer to schedule of payment at page 32. This schedule was never followed by the Plaintiff. Do you agree?

A: Yes, never.

Q: This schedule need not be followed by the Plaintiff?

A: Yes.

[8] As counsel for plaintiff submitted a party is bound by the evidence of its witness even if it is damning in some parts (see *Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang* [2000] 7 MLJ 74). For that reason, the parties could not have intended that the completion period be 36 months. Moreover the cause of action in this case is not based on the second agreement but on the first agreement that provided only 12 months for the payment of RM680,000 in the form of delivery of the completed apartment by way of the said contra deal in cl 2(ii). Clause 10(a) of the first agreement provided that the time shall be the essence. Therefore, the defendant was clearly in breach of the agreement when the solicitors of the plaintiff issued the termination letter. As I stated earlier, even up to present time, the defendant has not completed the apartment in question. Therefore it is

obvious that the defendant has no answer to the argument that the long delay amounted to a fundamental breach of the agreement which entitled the plaintiff to rescind the agreement.

[9] The plaintiff also pleaded that the defendant had failed to pay RM110,000 that was still owing to her. The calculation was made after giving credit for the RM680,000 represented by the contra deal in cl 2(ii) and the RM390,000 which was a second contra deal whereby the plaintiff's sons bought an apartment from the defendant. The computation is as follows:

Purchase price as stated in said agreement	RM1,575,000
Less: Payment on 28 July 2005	RM100,000
Contra Parcel E1/2–3	RM680,000
Payment on 19 September 2005	RM150,000
Payment on 12 October 2005	RM145,000
Contra Unit R3–2	RM390,000
Balance outstanding:	RM110,000

[10] At the outset, of the trial the plaintiff conceded that the defendant paid RM20,000 towards the purchase price of the land. The money was paid through the husband of the plaintiff. Therefore the defendant submitted that only RM90,000 remained unpaid. The letter of termination stated RM110,000 was unpaid. Plaintiff also submitted that RHB Bank released a loan of RM330,000 to the defendant for the contra deal wherein the plaintiff's sons purchased an apartment from the defendant but only RM310,000 was paid to the plaintiff. She claimed there was a shortfall of RM20,000 that remained unpaid from the loan that was released by the bank. Counsel for defendant submitted that the amount stated in the letter of termination was inaccurate because the defendant had allegedly paid RM40,000 to the plaintiff through her husband but it was not taken into account. I shall consider shortly whether the payment of RM40,000 can be considered as payment to the plaintiff. However, regardless of the inaccuracy of the amount stated in the letter rescinding the agreement, insofar as there was a fundamental breach because of the long delay in completing the apartment under cl 2(ii), the plaintiff is entitled to the remedy of rescission of the contract. Therefore the next question that arises is what are the payments that she can rightfully forfeit under the law?

FORFEITURE AND REFUND

[11] The plaintiff prayed that all monies that she had received from the defendant under cl 2 of the first agreement can be rightfully forfeited. The monies that she admitted receiving are as follows:

Deposit on signing	RM100,000
Payment on 19 September 2005	RM150,000
Payment on 12 October 2005	RM145,000
Payment from RHB loan (paid to plaintiff's sons)	RM310,000
Payment through plaintiff's husband	RM20,000
Total	RM725,000

[12] Counsel for plaintiff submitted that, excluding the sum paid to her sons, the plaintiff was paid RM415,000 and that she was entitled to forfeit this amount. Clause 13 of the agreement provides that:

> In the event of the Purchaser being in breach (of) any of the terms and conditions herein contained failing to tender the purchase price of the said Land in accordance with Clause 2 herein or refusing to purchase the said Land, then all sum(s) of money paid to the Vendor shall be forfeited as agreed pre-estimated liquidated damages …

[13] Although the parties have provided for the eventuality of breach in the agreement, forfeiture is regulated by s 75 of the Contracts Act 1950. It reads as follows:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[14] In *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89, the Privy Council ruled that once the court determines a sum of money is a 'true deposit', it is liable to forfeiture. By true deposit, the court meant that it is the sum of money to guarantee the contract and not merely part payment. In Malaysian law, there is no distinction between liquidated damages and penalties in view of s 75 (see *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817). Clause 13 allowed the vendor to treat all payments as 'agreed pre-estimated damages'. The use of such a term instead of 'penalty' will make no difference if the sum so named is not reasonable as plaintiff did not tender any evidence to show actual damage in this case. The right of the plaintiff to forfeit any sums already paid is governed by s 75 of the Contracts Act 1950. In some cases such as *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, the word 'deposit' was not used in the agreement. The court had to consider whether the series of payments made after the signing of the agreement could be forfeited for breach. The vendor sold his clinic for RM120,000. At the signing of the agreement he was

paid RM12,000. By the time the purchaser defaulted in settling the balance, he had already made part payments totalling RM96,000 which the vendor sought to forfeit. The court opined that in cases where the real loss can be measured by settled rules, failure to tender evidence will result in damages not being awarded. The court noted that the vendor did not attempt to prove actual loss although he could have done so. However the court allowed the vendor to forfeit RM12,000 that was paid at the signing of the agreement which represented 10% of the purchase price and which the court found to be reasonable. In the case of *Invescor Sdn Bhd v Sobena Maju Sdn Bhd* [2008] 2 MLJ 363, the Court of Appeal by a majority held that 10% of the purchase price of a contract for sale of land was a reasonable deposit to be forfeited. An interesting feature of that case which is not relevant to the facts of the instant case is that the 10% which amounted to RM1.5m had not been paid as yet. Only RM200,000 was paid at the signing of the agreement but the Court of Appeal held that it was recoverable as 10% of the purchase price of the land is conventionally accepted as a true deposit. In the recent Federal Court case of *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 3 MLJ 348; [2009] 4 CLJ 569, the subject matter of the dispute was two lots of land priced at RM4,590,000 and RM10,830,000 respectively. Upon default, the vendor sought to forfeit all the part payments which totalled RM9,018,400. It included the initial payment of 12% of the total purchase price which amounted to RM1,850,400. The vendor did not prove his loss and merely relied on the agreement to forfeit the part payments. I pause to note that the plaintiff in the instant case is claiming to forfeit all the part payments on the same footing. The Federal Court held that the vendor could not forfeit all the part payments as reasonable compensation without proof of loss or damage as envisaged by s 75 of the Contracts Act 1950. The Federal Court allowed the vendor to forfeit only the initial deposit of 12% which was considered to be reasonable and held that *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 was still good law.

[15] As I stated earlier, the plaintiff did not bring evidence to prove damages arising from loss of use of the land. She only relied on the agreement to forfeit the part payments of RM415,000 paid to her. Apart from this sum which had been paid to her, she caused the defendant to enter into a contra deal with her sons for the purchase of an apartment. Arising from the workings of this contra deal, the defendant paid RM310,000 to her sons. Counsel for plaintiff submitted no order to refund this sum can be made against her sons as the defendant did not join them as a party. This is a very convenient argument but it overlooks the undisputed fact that it was the plaintiff who caused the defendant to pay the sum of RM310,000 to her sons. Therefore the total sum that had been paid for the benefit of the plaintiff because of the agreement is RM725,000 which is 46% of purchase price of the land. In my opinion, in the absence of proof of loss, this is not reasonable compensation under s 75 of the Contracts Act 1950. The initial

payment at the signing of the agreement was RM100,000 and it is referred to as a 'deposit' which I think is an accurate description as it is meant to guarantee the performance of the contract. Having regard to the authorities cited, I am inclined to think that this figure is more reasonable. In fact in the alternative submission of counsel for plaintiff, this sum is prayed as compensation. In the premises, I order that the plaintiff may forfeit the deposit of RM100,000 paid under cl 2(1) of the first agreement. From the submissions, save for one sum of RM40,000 allegedly paid to the husband of plaintiff, there is no dispute over the other part payments that had been paid to the plaintiff. The plaintiff must, therefore, refund the sum of RM315,000 that had been paid to her in part payments by the defendant. In addition, the plaintiff had caused the defendant to enter into a contra deal whereby her sons purchased an apartment from the defendant in consequence of which a sum of RM310,000 was released to them. Therefore I make an order that the plaintiff refund the said sum to the defendant. During the trial the managing director of the defendant testified the defendant had paid RM40,000 towards settlement of the purchase price of the land to the plaintiff through her husband. The payment voucher that was exhibited at p 43 of the agreed bundle of documents bore the name of the plaintiff's husband. The plaintiff did not deny that her husband was paid this sum. However she averred that it was paid because of other dealings of her husband with the defendant. She said that it was not paid against the balance of the purchase price of her land. Nonetheless, she did not call her husband to the witness stand to testify otherwise. Instead her counsel canvassed a technical point of pleading. He said that the defendant did not plead that the RM40,000 was paid through the plaintiff's husband. I am of the view that there is no merit in this argument. The defendant pleaded in the statement of claim that RM40,000 was paid towards the purchase price of the land. It is trite law that one does not plead evidence but facts. The payment voucher was disclosed to the plaintiff during the discovery phase and it is found in the agreed bundle of documents. The name of the plaintiff's husband was stated on the voucher that was disclosed and exhibited by the defendant. The amount is stated as RM40,000. Therefore the plaintiff had ample notice that it was the defendant's case that they had paid RM40,000 as part payment of the purchase price and that they had intended to rely on the said receipt as evidence of payment. In the premises, the plaintiff had no ground to complain that she was taken by surprise during the trial. I find that there is no merit in the submission of counsel for plaintiff that the fact of payment of RM40,000 was not pleaded. I accept the evidence of the defendant's managing director that RM40,000 was paid towards settlement of the purchase price of the land in question for the following reasons. The plaintiff in her testimony admitted that her husband was involved in her transactions with the defendant from the beginning. She said as follows during cross-examination:

Q: From the very beginning of the transaction, who handled it? Your husband or yourself?

A: It was handled by my husband.

Q: In respect of the collection, you give him permission to collect?

A: The collection of money is by me, but sometime I asked my husband to collect.

[16] During the trial, the plaintiff also acknowledged a separate sum of RM20,000 that was paid through her husband. She also admitted that she was on good terms with him and lived in the same house. She did not give any details to support her assertion that her husband was paid RM40,000 for some other independent dealing. Finally she did not call her husband to refute the allegation of the defendant that he received RM40,000 on her behalf. In the premises, the plaintiff must refund the sum of RM40,000 to the defendant as well.

[17] In conclusion, having regard to my finding that the defendant had breached the sale and purchase agreement, I make the following orders:

(a) I declare that the said two agreements entered into between the plaintiff and the defendant is terminated;

(b) I declare that the plaintiff is entitled to forfeit the deposit of RM100,000 which was paid to her under cl 2(i) of the sale and purchase agreement of plaintiff's land;

(c) I order that part payments amounting to RM665,000 that were received for the benefit of the plaintiff be returned to the defendant;

(d) I order that the power of attorney Instrument No L16823/2005 is revoked;

(e) I order that the said Caveat Instrument No L654/2007 be removed; and

(f) Costs to the plaintiff to be taxed unless otherwise agreed.

Plaintiff's application allowed in part with costs.

Reported by Kanesh Sundrum